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VOLUNTARY LABOR ARBITRATION PROCEEDING

In the Matter of the Arbitration Between:

UFCW, Local 1099

-and-

The State of Ohio, Ohio Lottery Commission

Grievant: Ms. Rosalyn Noaks

Grievance No.: 22-03-960508-05-03-08

Grievance: Rosalyn Noaks' Promotion to Sales Representative 2

Arbitrator's Opinion and Award

Arbitrator: David M. Pincus

Date: August 7, 1997

Appearances

For the Employer

J. Scott Ford
John McNally

State of Ohio, Ohio Lottery Commission
Office of Collective Bargaining

For the Union

Peter M. Fox, Esq.

Issue

Whether the Ohio Lottery Commission's decision to promote Willard Browner rather than Rosalyn Noaks to the Sales Representative 2 position violated Article 14 and/or Article 6 of the parties' negotiated Agreement?

Joint Stipulations

1. The promotion of David Hartzell to Sales Representative 2 is not an issue in this arbitration.
2. Section 14.08 of the parties' Agreement outlines the correct procedures and criteria for sales representative promotions.
3. The Union and the grievant withdrew allegations of gender discrimination from the grievance.

Introduction

This is an arbitration proceeding under Step ____ of Article ____ of the Collective Bargaining Agreement between the State of Ohio, Ohio Lottery Commission, and the United Food and Commercial Workers ("UFCW"), Local 1099, effective _____ (the "Agreement"). The arbitration hearing was conducted and concluded on April 8, 1997. The parties had selected David M. Pincus as the Arbitrator.

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses, and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted post-hearing briefs in accordance with the guidelines agreed to at the hearing. The Arbitrator's award

is therefore based on the evidence presented at the hearing and the analysis and arguments presented in the parties' briefs.

Pertinent Contract Provisions

§ 14.08 - Selection Process

The employees who are in the same like classification series as the vacancy and are in the same district as the vacancy, who file timely applications, shall be considered for the vacancy. Employees who bid shall be given written notification of the results of the selection. That notice shall contain the name and seniority date of the successful applicant.

Where ability, reliability, and efficiency are relatively equal, seniority within the same like classification series within the same agency shall be the deciding factor for filling the vacancy except, in underutilized positions, promotions may be on the basis of Affirmative Action.

(Jt. Ex. 1, § 14.08, p. 40.)

Article 6 - Non-Discrimination

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining unit on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual preference, veteran status, or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio.

(Jt. Ex. 1, Article 6, p. 8.)

Case History

The facts underlying this grievance concern the promotion of Grievant Rosalyn Noaks ("Ms. Noaks") to the Sales Representative 2 vacancy ("Representative 2") at the Ohio Lottery Commission's ("Commission") Dayton Regional Sales Office.

Ms. Noaks has been employed by the Commission since 1986. She was first employed there for three years as a secretary, and in February 1989 she became a Sales Representative 1.

On March 27, 1996, the Commission posted two vacancies for Sales Representative 2. Ms. Noaks applied for both positions. Also applying for the Representative 2 positions were David Hartzell, Amy Moloney, Kim Barnes, Melanie Staley, and Willard Browner. Mr. Hartzell and Mr. Browner ultimately were selected for the Representative 2 positions.¹ Mr. Browner had been with the Commission since November 1992, having been hired initially as a Sales Representative 1.

Under Section 14.08 of the Agreement, the Commission had to consider ability, reliability, and efficiency upon reviewing and selecting candidates for the Representative 2 position. If two or more candidates' qualifications were relatively equal, seniority within the same like classification series within the same agency was the deciding factor for filling the vacancy (Joint Exhibit 1, § 14.08, p. 4).

All of the applicants were interviewed by Regional Manager, Jeff Inslee and then Personnel Director, Andre Burton. Upon evaluating each candidate's ability, reliability, and efficiency, Mr. Inslee and Mr. Burton considered: (1) the nature of the sales route each

¹ As noted in the Joint Stipulations, the Union's grievance does not challenge David Hartzell's promotion to Sales Representative 2.

applicant was then servicing; (2) each applicant's overall work record, including any complaints from Lottery agents and peers; (3) each candidate's attendance records; and (4) each candidate's personal interview performance.

As between Ms. Noaks and Mr. Browner, Mr. Inslee felt Mr. Browner assumed more responsibility and had better performance in a very difficult urban sales route known for its crime, troubled sales agents, turnover, and "floating" practices. Floating occurs when an agent fails to mark a portion of his ticket allotment as sold. This deprives or delays lottery revenue to the Commission. One of the significant duties of a sales representative is to enforce the Commission's prohibition on floating. Enforcement of this policy oftentimes involves tactful, interpersonal skills to diffuse stressful and sometimes confrontational personal interactions with agents.

Mr. Inslee also was concerned about complaints made against Ms. Noaks by several of her sales agents. In December 1994, Kohn's Newstand wrote a letter to the Commission asking that Ms. Noaks not return to his store. In 1996, the proprietor of Campbell's Pharmacy complained about what he characterized as Ms. Noaks' unprofessional conduct. In another instance, a variety store agent, Connie Oswald, who was also an Agent Advisor, who are considered to be the most trusted, knowledgeable sales agents, asked Mr. Inslee not to move her store to Ms. Noaks' district. She indicated Ms. Noaks had a serious attitude problem.

These complaints lead Mr. Inslee to recommend in Ms. Noaks' 1995-96 performance evaluation that she immediately improve her negative attitude and ability to communicate in a positive manner with agents. No negative comments or complaints by

agents were ever made about Mr. Browner and his performance evaluations did not contain any criticism of his attitude or employment conduct.

Ms. Noaks' and Mr. Browner's attendance records also differed significantly. Ms. Noaks took much more time off than Mr. Browner. In 1995, for example, with respect to vacation, sick and personal time, Ms. Noaks took 210 hours of time off as opposed to 122 hours off for Mr. Browner. A significant part of the difference in hours related to discretionary vacation time, but Ms. Noaks took off almost double the number of sick time hours than Mr. Browner in 1995.

Mr. Browner also did better than Ms. Noaks in the personal interview process. According to Personnel Director Burton, Mr. Browner was more direct, personable, and enthusiastic about his job and the opportunity to become a Representative 2. He also emphasized his community involvement as a Representative 1.

Mr. Burton felt Ms. Noaks was evasive and ignored customer services issues during her interview. Mr. Browner raised customer service as a priority and offered ideas for improved service of lottery agents. Customer service is a high priority of the current lottery administration and Mr. Browner's focus on it enhanced his desirability as a candidate during the interview.

In every category considered—ability, reliability, and efficiency, Mr. Inslee and Mr. Burton felt Mr. Browner was more qualified than Ms. Noaks. Since Mr. Inslee and Mr. Burton did not believe Ms. Noaks and Mr. Browner were equally qualified, Ms. Noaks' greater seniority was not considered. Mr. Browner was hired as simply the better qualified candidate for the Representative 2 position.

Merits of the Case

The Employer's Position

The Commission argues it selected Mr. Browner over Ms. Noaks because he was the most qualified candidate for the Representative 2 position. Section 14.08 provides the Commission the management right to determine the candidate with the most ability, reliability, and efficiency and those elements were considered here in an even-handed, non-discriminatory manner.

According to the Commission, when language like Section 14.08 is silent as to how and by whom the determination of qualifications is to be made, management is entitled to make the initial determination, subject to challenge by the Union on the grounds that management's decision was unreasonable under the facts, capricious, arbitrary, or discriminatory. The Union therefore must show that the Commission abused its broad discretion under Section 14.08 in selecting Mr. Browner for the position. The Union failed to present any such evidence.

The record establishes that Mr. Browner was selected over Ms. Noaks because of his more developed experience as a Sales Representative 1, his overall work record which did not include any complaints from agents or peers, his attendance record that demonstrated he was more reliable than Ms. Noaks, and his more enthusiastic, motivated, personal interview. These are all legitimate reasons within Section 14.08 to consider Mr. Browner more qualified than Ms. Noaks and to disregard her greater seniority.

The Union's Position

Ms. Noaks' ability, reliability, and efficiency were relatively equal to Mr. Browner and thus, as the most senior qualified candidate, she should have been selected for the Representative 2 position over Mr. Browner. She was not selected over Mr. Browner because of personal and political favoritism.

The Commission's argument that Mr. Browner is more qualified than Ms. Noaks is undermined by the inconsistency between the reasons stated in its Step 3 answer to the Union's grievance for not having selected Ms. Noaks and the expanded arguments and reasons it offered during its opening statement and throughout the arbitration hearing.

In general, the Commission's reasons for Mr. Browner's selection are overstated and unfounded. His experience in an urban sales district did not make him more qualified than Ms. Noaks. The written complaints about Ms. Noaks are not a valid basis for awarding the promotion to Mr. Browner over Ms. Noaks. She was not disciplined for the complaints, was not charged with any misconduct, and the sales agent was not removed from her district.

Ms. Noaks' attendance record and her personal interview performance should not be considered because it was not given as a reason during the grievance process for the Commission's decision not to select her for the Representative 2 position. The Commission is therefore estopped from raising these after-the-fact reasons to fortify its decision for selecting Mr. Browner for the Representative 2 position. In any event, Ms. Noaks took comparatively as much time off as Mr. Browner and the highly subjective conclusion that Ms. Noaks interviewed better than Mr. Browner just means the Commission gave the promotion to Mr. Browner simply because it liked him better than Ms. Noaks.

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record, including pertinent contract provisions, exhibits, the parties' briefs, and the Arbitrator's notes of the witnesses' testimony, the Arbitrator finds that the Commission properly awarded Mr. Browner the Representative 2 position over Ms. Noaks in accordance with Section 14.08 of the Agreement. The Arbitrator's decision is based primarily on a lack of evidence that the Commission's selection of Mr. Browner over Ms. Noaks for the Representative 2 position was unreasonable under the facts, capricious, arbitrary, or discriminatory.²

As jointly stipulated by the parties, Section 14.08 of the Agreement outlines the correct procedures and criteria for filling the Representative 2 position. In this Arbitrator's view, when read together with the inherent management rights reserved to the Commission under Article 3 of the Agreement, Section 14.08 implicitly allows the Commission to determine the ability, reliability, and efficiency of candidates for a vacancy. Consideration of ability, reliability, and efficiency is not limited, contrary to the Union's argument, solely to a consideration of past performance reviews. Seniority is relevant only when the Commission believes the factors in Section 14.08 are relatively equal between two final candidates for the vacancy.

The ability, reliability, and efficiency standards of Section 14.08 therefore control the disposition of the Union's grievance. Resolution of the grievance is based on whether

² Because the Arbitrator has found that the Commission's selection of Mr. Browner over Ms. Noaks was not unreasonable under the facts, capricious, arbitrary or discriminatory, the Union's grievance that Ms. Noaks was denied a promotion because of political affiliation is denied as well.

the Arbitrator believes a preponderance of the evidence exists on the record to establish these elements. Contrary to the Union's argument, the Commission's Step 3 response does not frame the scope of the inquiry here. To limit the analysis of Ms. Noaks' and Mr. Browner's qualifications for the Representative 2 position to the parameters of the Commission's Step 3 response would effectively modify the broader latitude provided to the Commission under the express language of Section 14.08.⁴

In the Arbitrator's opinion, sufficient evidence existed to support the Commission's decision that Mr. Browner's ability, reliability, and efficiency exceeded Ms. Noaks' qualifications on that basis. The Commission felt Mr. Browner's Representative 1 experience in a more difficult urban environment developed his personal and professional skills more than Ms. Noaks' experience in a less stressful rural district. Although the Union argued Ms. Noaks' and Mr. Browner's performance reviews were very similar, it never persuasively rebutted the more demanding nature of an urban district and Mr. Browner's excellent performance in his district. The Arbitrator therefore finds the Commission's consideration of Mr. Browner's more developed professional skills as a result of his urban experience to be a legitimate consideration of his greater ability as a potential Sales Representative 2.

Mr. Browner's greater ability for the Representative 2 job was further corroborated by the absence of any complaints about his personal or professional conduct by agents

⁴ This does not mean the Arbitrator disregarded the inferences raised by the Union based on the differences between the Commission's Step 3 response and its arguments raised for selecting Mr. Browner over Ms. Noaks at the arbitration hearing. The Arbitrator considered those inferences upon assessing the credibility of the Commission's evidence for selecting Mr. Browner over Ms. Noaks, but not to limit the scope of the inquiry of the record as to what elements the Commission considered in its selection of Mr. Browner over Ms. Noaks.

or peers. Ms. Noaks, on the other hand, had several complaints made against her by sales agents about her personal and professional conduct. For example, as conceded by the Union, Ms. Noaks mistakenly attempted to force the Kohn's newsstand agent to sign a float notification form in 1994 which undoubtedly led to his complaint against her (Union's Br., p. 5). This is just one incident that resulted in critical comments about Ms. Noaks' personal skills in her performance evaluation. Although the Union questioned the general nature and degree of the agents' complaints, it did not deny their existence.

Mr. Burton's perception of Mr. Browner's enthusiastic, motivated interview for the Representative 2 position establishes the Commission's consideration of Mr. Browner's and Ms. Noaks' relative abilities. The Union's criticism of Mr. Burton's opinion of Mr. Browner's superior interviewing skills as highly subjective was belied by its failure to persuasively rebut Mr. Browner's positive attitude or enthusiasm for his job. The Commission's failure to cite Mr. Browner's more positive attitude in its Step 3 response to the Union's grievance is not significant. Consideration of a candidate's attitude toward his job is a fundamental element of any job interview.

Thus, when the Commission had to select in a competitive process from two candidates based on their relative ability, and one highly motivated candidate worked in a difficult district without any complaints about him personally or professionally and the other candidate worked in a less demanding district and had complaints about her, it was not an abuse of discretion under Section 14.08 for the Commission to consider Mr. Browner more able than Ms. Noaks for the Representative 2 position.

The Commission's assessment of Mr. Browner's and Ms. Noaks' reliability and efficiency is based on a consideration of their attendance records. While the Arbitrator may draw inferences that the Commission's failure to mention Ms. Noaks' attendance record in its Step 3 answer raises questions about whether attendance was even a meaningful consideration here, Ms. Noaks did undisputedly take considerably more time off than Mr. Browner in 1995. Considering a Representative 2 substitutes during a Representative 1's absence, attendance records were a legitimate consideration. The Commission therefore was not unreasonable in its view that someone with a better attendance record would be more reliable and thus more efficient for the lottery program.

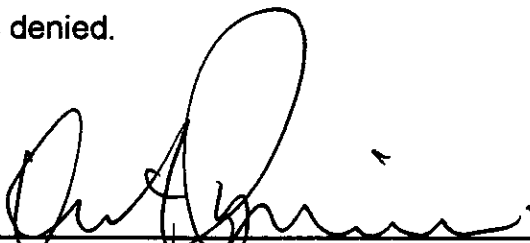
Even if the Arbitrator disregarded the attendance disparity for purposes of reliability given the Commission's failure to cite it as a reason in its Step 3 answer, the Arbitrator can also conclude that the significant disparity of time off between Mr. Browner and Ms. Noaks corroborates Mr. Burton's testimony that Mr. Browner was a more enthusiastic and dedicated Sales Representative 1. Mr. Browner's judicious use of vacation time makes Mr. Burton's perception of Mr. Browner's dedication and enthusiasm for his job more credible and less subjective.

In my judgment, based on an overall balance of the evidence, the Commission's selection of Mr. Browner over Ms. Noaks for the Representative 2 position was based on considerations of their relative ability, reliability, and efficiency. A preponderance of the evidence exists to support the Commission's determination that Mr. Browner and Ms. Noaks were not relatively equal upon consideration of these standards so that Ms. Noaks' greater seniority would not require her selection for the Representative 2 position.

Award

The grievance is denied.

Dated August 7, 1997
Cleveland, Ohio



Arbitrator David M. Pincus